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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of Themselves and All Others Similarly Situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, AS *AMICUS CURIAE*

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BRIEF FOR COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, AS *AMICUS CURIAE*

Interest of the *Amicus*

The Communications Workers of America, AFL-CIO, (hereinafter "CWA") submits this brief *amicus curiae* with the consent of all parties pursuant to Supreme Court Rule 42(2).[1] CWA is an international labor organization representing non-supervisory employees in the communications industry and other industries throughout the country.

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[1] Letters of counsel for Petitioner and Respondents consenting to the filing of this brief have been filed with the Clerk of the Court.

As of October, 1974, CWA represented 500,881 employees in collective bargaining units at the American Telephone & Telegraph Company and Associated Bell Companies (hereafter "Bell System"). 55% of these employees are women.

CWA is a party plaintiff in seven cases now pending in six federal district courts[2] involving the application of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* (hereafter "Title VII" or "the Act") to the denial by Bell System employers of equal rights, benefits and privileges of employment to women disabled by pregnancy. One of these cases, *Communications Workers of America, et al.* v. *American Telephone & Telegraph Company, Long Lines Department,* is presently before this Court on Petition for Writ of Certiorari filed by American Telephone & Telegraph Company, Long Lines Department (hereafter "A.T.&T.") on June 19, 1975.[3] The district court dismissed *sua sponte* CWA's complaint against A.T.&T. due to this Court's decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) (*"Aiello"*) on July 11, 1974, 379 F. Supp. 697 (S.D.N.Y. 1974). The United States Court of Appeals for the Second Circuit reversed the district court on March 26, 1975 and remanded the case for further proceedings, 513 F. 2d 1024 (2d Cir. 1975). Upon this Court's granting of certiorari in the case at bar, proceedings there

[2] *CWA* v. *A.T.&T., Long Lines Department, petition for cert.* filed, 43 U.S.L.W. 3684 (U.S. June 24, 1975) (No. 74-1601); *CWA* v. *Illinois Bell Tel. Co.,* No. 73-C-959 (N.D. Ill., 1973); *CWA* v. *Southern Bell Tel. & Tel.,* No. 18328 (N.D. Ga., 1973); *CWA* v. *New York Tel. Co.,* C.A. No. 73-3352 (S.D.N.Y., 1973); *CWA* v. *Southwestern Bell Telephone Co.,* Civil Action No. 74-315 (E.D. Missouri); *CWA* v. *The Pacific Tel. & Tel. Co.,* C.A. No. C-73-1739 RFP (N.D. Cal., 1973); and *CWA* v. *South Central Bell Tel. Co.,* C.A. No. 73-1771 Section A (E.D. La., 1973).

[3] No. 74-1601. Respondents' Brief in Opposition, filed September 3, 1975, indicated the reasons why certiorari might be denied, but also requested consolidation with this case in the event certiorari was granted without summary affirmance.

have been stayed pending determination of the merits insofar as the Court's decision here could affect further proceedings in that action.[4]

The Bell System provides its employees with an employer-funded fringe benefit in the form of a "Plan for Employees' Pension, Disability Benefits and Death Benefits" (herein "the Plan"). Any employee unable to work for more than seven days, regardless of the cause of disability, is entitled to the protection of the Plan during the disability period. This protection includes significant employment rights such as retention of service credit (seniority), wage progression credit, reinstatement priority, paid medical and hospitalization insurance premiums and weekly income protection payments based on a formula related to the salary and service credit of a disabled employee. Retention of service credit affects an employee's entitlement to pensions, vacations, transfer, promotion, continued disability protection, and guarantees job retention rights in the case of lay-offs.

Only women disabled by pregnancy are excluded from the Plan's protection. Sickness benefits afforded under the Plan established by Bell System employers are charged as operating expenses of the company "as and when paid." Payments under the Plan are made to all disabled employees except women disabled by pregnancy, regardless of the number of employees disabled in any given fiscal year. The Plan's protection is not geared to actuarial statistics, nor does it contain any limitation on the number or type of covered disabilities employees claim in any given year. Length of income protection eligibility is based upon length of service with the company. The Bell System's concept of

[4] All the other CWA cases have, in effect, been stayed pending action by this Court.

aggregate risk protection is aimed at the risk of *disability* and is unconcerned with the type of condition or its cost or duration. No sex-unique disability other than pregnancy is denied protection.

CWA has been working to include women disabled by pregnancy within the scope of employer disability benefits plans in various companies including the Bell System for many years. It has assisted its female members in processing complaints with the Equal Employment Opportunity Commission ("EEOC") and state fair employment practices agencies implementing legislation comparable in scope and intent to Title VII, and has instituted grievance proceedings on their behalf. In April, 1972 CWA filed Charges of Discrimination with the EEOC against the Bell System on behalf of its female members and followed with the filing of the lawsuits described above.

In all of these actions, the Bell System defendants have interposed a defense to the claim of sex discrimination under Title VII which denies liability for disparate treatment of women disabled by pregnancy on the grounds that such treatment is "based upon a rational and neutral business justification under the Act." This defense, often referred to as the "business necessity" defense, includes the contention that the costs of covering pregnancy disability are too great to mandate Bell System compliance with the Act's prohibition of sex discrimination.[5] In view of the

[5] Petitioner's brief (pp. 15-18, 21-24) and Petition for Writ of Certiorari, p. 9 and n. 17) discuss the costs of equal treatment of women disabled by pregnancy, alleging that they constitute a "legitimate consideration" for disparate treatment of such disabilities. At the trial court, Liberty Mutual offered no substantive evidence of a cost or business necessity defense, 372 F. Supp. at 1162-1164. The Third Circuit noted that Liberty Mutual "did not assert at trial or on its motion for reconsideration any affirmative defense, nor did it allege any evidentiary facts that could arguably give rise to a defense," 511 F. 2d at 208.

concerns expressed by this Court in *Aiello* over the costs of providing equal insurance coverage to women disabled by pregnancy, 417 U.S. at 495-496, CWA is anxious to have its views before the Court on the availability and applicability of the business necessity defense in this case interpreting Title VII.

Opinions Below

The opinion of Judge Weber of the Western District of Pennsylvania granting respondents' motion for summary judgment is reported at 372 F. Supp. 1147. The opinion of the United States Court of Appeals for the Third Circuit, affirming the district court in all respects, is reported at 511 F. 2d 199.[6]

Question Presented

Does an employer's exclusion from coverage of pregnancy-related disabilities from an otherwise comprehensive employee disability income protection plan constitute sex discrimination proscribed by Title VII of the Civil Rights Act of 1964?

Introductory Statement

Employment discrimination based upon stereotypical judgments about women, like minorities, has led employers to claim numerous excuses for permitting differential treatment in the job marketplace. Perhaps the most com-

[6] Liberty Mutual's hiring and promotional practices were held discriminatory by the trial court at 372 F. Supp. 1152-1155, and affirmed by the Third Circuit at 508 F. 2d 239 (3d Cir. 1975). Liberty Mutual has filed a separate Petition for Writ of Certiorari (No. 74-1288) seeking review of that decision.

mon stereotype which has plagued women who seek equal access to every aspect of employment, has been the notion that their childbearing function or potential will ultimately make them part-time or one-time employees, thereby making it wasteful or economically burdensome to hire, train, promote, or transfer them or to afford comparable fringe benefits on a par with those afforded to men. These notions about a woman's actual or potential motherhood have operated historically to exclude most women from meaningful jobs and many from any job at all. Liberty Mutual's denial of income protection benefits to women disabled by pregnancy, and its termination of these women, are merely one aspect of the many methods used by employers, relying upon stereotypes surrounding the biological fact that women bear children, to limit or deny equal employment rights to women.[7] It is significant that the only sex dis-

[7] In the case of the Bell System, the denial of benefits includes loss of other employment rights such as seniority and wage progression credit. In cases such as *Satty* v. *Nashville Gas Company*, 11 FEP 1 (6th Cir. 1975), *affg.* 384 F. Supp. 765 (E.D. Tenn. 1975), and *Hutchison* v. *Lake Oswego School District*, Nos. 74-3181, 3182 (9th Cir. July 21, 1975), *affg. in part* 374 F. Supp. 1056 (D. Ore. 1974), employers refused to permit women disabled by pregnancy to obtain accumulated paid sick leave for pregnancy disability. In cases such as *Holthaus* v. *Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. 1975), the employer terminated a woman so disabled, rather than permit use of accrued vacation pay and then leave without pay. In *Gilbert* v. *General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974), affd., —— F. 2d ——, 10 FEP Cases 1201 (4th Cir. 1975), *joint pet. for cert. pending*, Nos. 74-1589 and 1590 (hereafter *"Gilbert"*), the challenge to the employer's disparate treatment of pregnancy originally included a policy which forced pregnant employees to leave at the sixth month of pregnancy, a policy subsequently invalidated by this Court in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). The marital status of women, but not men, has been used to bar hiring or force resignation, *Sprogis* v. *United Airlines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971), *cert. den.* 404 U.S. 991 (1971). Employers have refused to employ or fired unwed mothers, but not unwed fathers, *Doe* v. *Osteopathic Hospital of Wichita*, 333 F. Supp. 1357 (D. Kan. 1971); *Drake* v. *Covington County Board of Education*, 371 F. Supp. 974 (M.D. Ala. 1974).

crimination case under Title VII to come before this Court involved an employer's policy of refusing to hire women on the basis of their status as mothers of pre-school children. *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1972).

The adverse impact of the policies challenged in this action upon working women is clear. It is not mere economics which prevent employers from according equal treatment to women disabled by pregnancy; the economics merely shroud a societal stereotype of women as mothers first and workers second. The singling out of a major portion of the labor force for disparate treatment because of an immutable biological fact necessary for human survival is wrong.[8] To achieve the full equality for all required by Title VII, we must afford equal rights to all. As Judge Mehrige recognized in *Gilbert*, 375 F. Supp. at 383:

> If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's

[8] This distortion of the unique role women play in the reproductive process to a defense for barring them from the productive process of full employment has been the subject of intensive study and analysis. See, e.g., Hayden, *Punishing Pregnancy: Discrimination in Education, Employment and Credit*, American Civil Liberties Union: Women's Rights Project, October, 1973, pp. 21-63; Citizens' Advisory Council on the Status of Women (herein "CACSW"), "A Statement of Principles with Respect to Job Related Maternity Benefits," *Women in 1970* (G.P.O. 1971); Comment, "Loves Labors Lost: New Conceptions of Maternity Leaves," 7 *Harvard Civil Rights—Civil Liberties Rev.*, 260 (1972); Koontz, "Childbirth and Child Rearing Leave: Job Related Benefits," 17 *New York Law Forum*, 481 (1971); President's Commission on the Status of Women, "Report of the Committee on Social Insurance and Taxes," p. 57 (Oct. 1963); Comment, *"Geduldig* v. *Aiello:* Pregnancy Classifications and the Definition of Sex Discrimination," 75 *Columbia Law Review* 440, 456-461 (1975) (herein "Pregnancy Classifications"); Cary, "Pregnancy Without Penalty," 1 *Civ. Lib. Rev.*, 31 (1974); Johnston, "Sex Discrimination and the Supreme Court," 49 *New York University Law Rev.*, 617, 642-661, 673-688 (1974).

biologically more burdensome place in the scheme of human existence. An industrial policy which does not account for this fails in providing such sexual equality as is within its power to produce.

Summary of Argument

1. The Court below correctly found that an employment policy which fails to treat women disabled by pregnancy in the same manner as all other disabled employees discriminates on the basis of sex in violation of Title VII of the Civil Rights Act. The Court properly held that this Court's Equal Protection Clause analysis of a state social welfare decision in *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), had no application to the statutory analysis required under *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). Petitioner's disability policies single out a group of women protected by Title VII for disparate treatment of a disability they alone suffer by relying upon stereotyped notions of the childbearing function of women and the place they occupy in the job market. Petitioner's disability program is not grounded on equalized actuarial factors. It insures employees against the risks attendant to inability to work, not against particular conditions. Thus, it does not provide "aggregate risk protection" to men and women alike. Employer denial of protection to women disabled by pregnancy aggravates existing salary, hiring and promotional discrimination, and limits their full enjoyment of employment rights available to all other employees. The objectives of employer disability benefits programs are related to employee loyalty, morale and productivity. Exclusion of a statistically predictable number of women from their coverage does not serve these objectives. The operation of these policies denies equal employment benefits

to women in an arbitrary and unnecessary manner condemned by Title VII.

2. The Court below correctly rejected Petitioner's unsubstantiated claims of costs as a defense to its exclusion of women disabled by pregnancy from its disability program. Costs are not a defense to discriminatory treatment of protected groups under Title VII and are insufficient to constitute the type of "business necessity" which could excuse such discrimination. Neither the courts, nor the Equal Employment Opportunity Commission Guidelines implementing Title VII, permit claimed costs to justify disparate treatment. Petitioner has failed to meet the stringent test of "business necessity" by failing to demonstrate that its policies are necessary in order for it to remain in business, that exclusion of pregnancy is related to its fringe benefit objectives, and that no acceptable alternative exists which would accomplish the objectives of disability protection with a lesser differential impact. The public policy of eliminating all vestiges of discrimination, as expressed by Congress in Title VII, precludes the defense of costs as an excuse for failing to comply with the law. The fact that it is less profitable to do business in a lawful manner has been rejected as a defense in many areas of the law, both in the area of racial discrimination and in other areas, such as antitrust violations. The rejection of the costs defense is not inconsistent with this Court's holding in *Geduldig* v. *Aiello, supra,* because the motives of an employer in establishing fringe benefits have self-serving ends, in contrast to the altruistic objectives of states in establishing social welfare programs to assist their citizens under the police power. The differing objectives of employers are a further indication that mere finances cannot excuse discrimination against a substantial segment of its female employees.

3. Petitioner has been unable to provide any objective data which would show that the costs it claims would be incurred in granting protection to women disabled by pregnancy are either accurate or devastating under the concept of business necessity. Statistics submitted by various *amici curiae,* and relied upon by Petitioner, fail to show that women presently benefit disproportionately from benefits programs or that the coverage of pregnancy-related disability will prove too great. *Amici's* statistics are self-serving, fail to include relevant factors other than sex which affect disability frequency and severity, are based upon data which is limited by age and scope, and limited by stereotypes about women. This data also excludes the impact that past and present discrimination has had upon women. Neutral studies of projected disability costs, on the other hand, indicate that protecting women disabled by pregnancy will increase employer costs by a mere fraction of their total wage and salary costs. This conclusion is supported by the fact that Congress, federal agencies, numerous private employers, many states and most other nations have elected to protect women from this risk of disability without any of the disastrous consequences predicted by Petitioner and *Amici.*

ARGUMENT

I.

The Courts Below Were Correct In Finding Prohibited Sex Discrimination Under Title VII.

The Courts below found Liberty Mutual's exclusion of pregnancy disability from benefit protection to be in violation of Title VII and the EEOC Guidelines of Sex Discrimination interpreting the Act, 29 C.F.R. §1604.10.[9] The Third Circuit found this court's Equal Protection Clause analysis in *Aiello* to have no application to the statutory question of whether the employer had engaged in sex discrimination prohibited by Title VII, 511 F. 2d at 203-204. The Court turned instead to the direct interpretation of Title VII expressed in *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431 (*"Griggs"*) holding that employment practices which treat a protected class of persons in a disparate manner, despite the appearance of neutrality, are forbidden. The adverse impact of the policies challenged here and elsewhere upon women is major and irremediable unless Title VII's proscription of disparate treatment is upheld by this Court.[10]

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[9] See, 511 F. 2d at 203-207 and 372 F. Supp. at 1157-1164. Amicus understands that other briefs *amicus curiae* will address the correctness of these Guidelines and the courts' deference to them.

[10] This Court interpreted Title VII in *Griggs* as barring "neutral" practices which "operate invidiously to discriminate on the basis of racial or other impermissible classifications," 401 U.S. at 431. Even assuming that the exception in *Aiello's* footnote 20 of pretexts for invidious discrimination could properly be applied beyond the factual and legal context of that case, it must be assumed that, under Title VII, Liberty Mutual's policies cannot stand since they *operate* in a discriminatory manner. Pretexts for invidious discrimination under the Fourteenth Amendment involve questions of motive, but motive is irrelevant under Title VII. ***Local 189, United Papermakers & Paperworkers*** **v.** ***United States,***

A. Petitioner's Policies Are Not Related To Its Fringe Benefit Objectives

The employer decision to make fringe benefits available to its work force plays a critical role in the employee's decision to accept a job and to remain in that work force and seek better and more responsible positions within it. Vacations, sick leave, disability protection, insurance coverage and retirement programs may often be more attractive to a potential employee than the actual wages she or he receives. As the Fifth Circuit noted in *Rogers* v. *Equal Employment Opportunity Commission,* 454 F. 2d 234, 238 (5th Cir. 1971), *cert. den.,* 406 U.S. 957 (1972):

> As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection, nor blind ourselves to their potential misuse.

Employers afford fringe benefits to increase work-force loyalty, morale and productivity, as well as to obtain favorable tax treatment by deducting such fringes as an operating expense. See, generally, Allen, *Fringe Benefits: Wages or Social Obligation* (1964), pp. 37-42. Many of the self-serving justifications offered by Petitioner herein for denying such benefits to a significant group of its female employees, such as costs and non-return rates (Pet. Br. pp. 15-21), lose their significance when viewed in the light of such apparently neutral objectives. Since any added costs of equalizing fringe benefits amount to additional tax advantages to the employer and where non-

416 F. 2d 980, 996 (5th Cir. 1969), *cert. den.* 397 U.S. 919 (1970). The discriminatory *operation* of these challenged policies is the key to their invalidity under the Act.

return rates are a function of employee morale and loyalty generated by benefit availability,[11] it is clear that Liberty Mutual's present policies are *not* neutral, but rather are a clear example of stereotypical judgments about women and pregnancy which place a barrier to equal employment opportunity before a protected group under the Act in an "artificial, arbitrary and unnecessary" fashion, *Griggs, supra,* 401 U.S. 431.

B. Discriminatory Impact on Women Generally

The United States Department of Labor has found that over half of the women who work do so out of compelling economic necessity. Most women support both themselves and families; 22% have husbands with annual incomes of between $3,000 and $7,000. See: U.S. Department of Labor: Women's Bureau, *Why Women Work,* 1 (rev. ed. May, 1974); Murray, "Economic and Educational Inequality Based on Sex: An Overview," 5 *Valparaiso* U.L. Rev. 237, 239-241 (1971); U.S. Department of Labor, Bureau of Labor Statistics: "Marital and Family Characteristics of Workers, March 1969," Special Labor Force Report No. 120. In 1972, working mothers comprised 42% of the work force. Of these, approximately 38.3% had children between the ages of three and five. Minority women accounted for 50% of all women working, according to 1970 census statistics.[12]

[11] See, generally, the surveys conducted by Prentice-Hall, *Personnel Management Policies & Practices Report Bulletin,* No. 16 (1973) pointing out that return rates for disabled women following childbirth increase, often dramatically, when the employer makes disability protection available to them. See also, "Pregnancy Classifications," *supra,* 75 *Col. L. Rev.* at 478-479.

[12] These statistics appear in Hunt, Report and Recommendations for the Office of the Secretary, Department of Health, Education & Welfare: "Occupational Health Problems of Pregnant Women" (April 30, 1975), p. 9. 43% of the total American female population was working in 1970.

In 1970, the annual wage of such women was 60% of that earned by men.[13] U.S. Department of Labor: Women's Bureau, *Fact Sheet on the Earnings Gap* (rev. ed. 1972). Working women heading families in 1972 had median earnings of $4,140 per year. Nearly one-third of the families headed by women are minority families, yet median earnings of these women in 1972 were $3,370, as compared to $4,460 for families headed by white women.[14] In *Kahn* v. *Shevin*, 416 U.S. 351, 353 (1974), this Court took note of the fact that "the job market is inhospitable to the woman seeking any but the lowest paid jobs." This recognition underscores the devastating impact that employer policies such as Liberty Mutual's have upon women who become disabled by pregnancy by adding additional burdens to existing economic inequities they already face.

Not only are women paid less than men, but their opportunities for advancement are far less, and they are substantially more likely than men to be underutilized in the jobs they hold.[15] A study of Bell System employment practices conducted in 1971[16] indicated that 80% of its female employees hold job classifications with a basic annual wage of less than $7,000, as compared to only 4% of its male employees. On the other end of the wage scale,

[13] This disparity has not diminished in more recent years. The median income of men working full-time in 1973 was $11,468, compared to $6,488 for women. See U.S. Department of Commerce, "Consumer Income," Series P-60 No. 93 (July, 1974), Table 2.

[14] These statistics appear in Hayghe, "Marital and Family Characteristics of the Labor Force in March 1973," *Monthly Labor Review* (April 1974), p. 21, 24-27. Minority women hold a greater percentage of low-skilled, low-paying jobs than white women and have an unemployment rate more than twice as high.

[15] See, generally, U.S. Department of Labor: Women's Bureau, *Underutilization of Women Workers* (rev. ed. 1971). Waldman & McEaddy, "Where Women Work—An Analysis By Industries and Occupation," *Monthly Labor Review*, May 1974, p. 3.

[16] Equal Employment Opportunity Commission Report, "A Unique Competence: A Study of Equal Employment Opportunity in the Bell System" (1971) (herein "Copus Report"), pp. 59-60.

only 3% of the System's women earned $13,000 per year or above. It found that "Bell's incumbent female employees, given their age, education and experience, are paid an aggregate of $500 million per year less than males with comparable personal characteristics." Copus Report, pp. 174-176.

C. Discriminatory Impact on Women in the Bell System

The operation of Bell System policies which deny employment benefits and rights to women disabled by pregnancy demonstrates the broad impact of such policies upon the employment rights of female employees.

Women disabled by pregnancy within the Bell System have their employment rights limited in the following ways, not experienced by any other disabled employee:

1. They receive no income protection under the Plan during any part of their disability period. Unlike other disabled employees, a non-pregnancy-related disability (such as a broken leg) which occurs during the disability absence is not covered. A male disabled for any reason receives protection for the second disability.[17]

2. They do not accrue service credit (seniority) beyond 30 days, regardless of the length of actual disability. They accrue no wage progression credit (credit toward promotion and advancement). Even if a disability arises during leave which would otherwise be covered under the Plan, no service credit is given.

[17] Even Liberty Mutual does not preclude such non-pregnancy-related disabilities from coverage. See Pet. Br., pp. 15-16, n. 26. Failure to make any payments whatsoever to female employees absent due to pregnancy disability must be contrasted to the Bell System policy of making differential payments (as well as granting seniority) to employees (generally male) absent for military service. Whether or not such a policy is desirable, it shows an employer's willingness to accommodate probable exigencies in lives of working men, while refusing to accommodate a predictable exigency in the lives of working women.

Retention of service credit has great significance to a Long Lines employee: seniority affects pension plan rights, entitlement to permanent promotion, vacation eligibility, transfer opportunities, susceptibility to lay-offs or termination, as well as the amount of disability benefits an employee receives for a covered disability. Seniority even affects eligibility for inclusion in the company's Upgrade and Transfer Plan adopted pursuant to the Consent Decree entered into between EEOC and Bell System employers to correct some of its discriminatory practices against women and minorities. See, *E.E.O.C.* v. *A.T.&T. Co.*, 365 F. Supp. 1105 (E.D. Pa. 1973), *mod. o. o. g.* 506 F. 2d 735 (3d Cir. 1975); Copus Report, *supra.*

3. They must pay the cost of remaining within the company's Basic Medical Expenses Plan during the period on maternity leave.

4. They must obtain an Application for Leave of Absence at least sixty days prior to the date when termination of active employment appears desirable, although notice of disability protected by the Plan need only be given at time of absence. At least nine companies or departments required pregnant employees to leave work at the seventh month of pregnancy until 1971. The requirements that application for leave be made by the seventh month may continue, in effect, a substantially mandatory leave date at the end of the seventh month, regardless of the woman's ability and desire to continue to work.

5. A Bell System policy existed at least until June, 1971 which did not assure re-employment following maternity leave, and, moreover, required the woman to agree that her application for leave be considered a voluntary termination of employment in the event that she was not re-employed. Reinstatement is assured to other disabled employees. See, generally, Copus Report, pp. 148-150.

6. The Bell System, unlike Liberty Mutual, claims to cover complications of pregnancy (i.e., toxemia, ectopic pregnancy and pre-eclampsia) under the Plan. However, these disabling conditions qualify for coverage *only* if the employee has not already left her job. Once classified as "inactive" by the employer, no complication of pregnancy, however serious or life-threatening it may be, is covered. In view of the fact that ten percent of all pregnancies may encounter disabling complications, neither Liberty Mutual nor the Bell System are conforming to the mandate of law in this area. *Cf. Aiello,* 417 U.S. 489-490.

In short, women *are* disabled by normal pregnancy and childbirth and may be additionally disabled by complications of pregnancy, in the same manner as men are disabled by other conditions. To justify disparate treatment of pregnancy-related disabilities because pregnancy is a condition unique to women, may satisfy Fourteenth Amendment standards of reasonableness in construing a State's social welfare programs, but it cannot be said to justify an employer's fringe benefit policies where other "unique" conditions, inextricably linked to race, sex or national origin, are covered. Petitioner concedes (Pet. Br. pp. 15-16, n. 26) that refusal to cover the unique condition of sickle-cell anemia would amount to effecting a "pretext for invidious discrimination," but contends that the expense of covering pregnancy disability justifies its exclusion. This contention, of course, answers the Question Presented in the affirmative, but offers a cost or "business necessity" defense to the discriminatory policies.

D. Exclusion of Pregnancy from Employment Disability Programs Fails to Provide Aggregate Risk Protection

The discriminatory operation of Petitioner's disability benefits program not only fails to meet the Title VII analysis of *Griggs,* but also fails to provide aggregate risk

protection found to exist in *Aiello*. Liberty Mutual contends that its disability income protection plan does not differentiate on the basis of sex in terms of "aggregate risk protection" because each employee is "protected from the same risks." However, it has established a program of employee benefits which insures them against the risks of *disability*, not the risks attendant to particular conditions. Like the Bell System, General Electric and other employers whose exclusion of pregnancy from disability protection programs is being challenged under Title VII, the relevant aggregate risk insured is *inability to work* and the resulting need for financial assistance and job protection during that period of time.

Liberty Mutual contends that it does not cover a number of causes of such disability[18] but that, of the causes which are covered, men and women are equally protected when they occur. While it may be argued that an employer may reasonably elect to remove some causes of disability from the scope of a disability benefits plan, the inquiry under Title VII is whether it may elect to exclude a cause which is exclusively suffered by women. Disabilities caused by pregnancy and childbirth are not only unique to women, but constitute a fairly predictable number of disability absences during a given period.

In *Aiello*, this Court found that equal aggregate risk protection meant that the fiscal and actuarial benefits of the program accrued to members of both sexes. 417 U.S. at 496-497, n. 20. Liberty Mutual has made no showing that

[18] Liberty Mutual's Brief (p. 4) notes that certain causes of disability experienced by both men and women are excluded, such as those caused by attempted suicide, self-inflicted injury or cosmetic surgery. The Bell System, like General Electric, covers these disabilities as well. Stipulations of fact admitted at trial in the *Gilbert* case found that these disabilities occur in a statistically small segment of the employee population, 375 F. Supp. at 374.

the actuarial benefits of its present program accrue to women equally with men. Like the Bell System, no evidence is offered as to present costs or dollar benefits of the program, although a substantial amount of attention is given to the claimed differences between men and women in terms of the percentage of benefit claims made compard to their percentage in the work force. *Cf. Aiello*, 417 U.S. at 497, n. 21.

Liberty Mutual devotes substantial attention in its brief to the claimed "equal contributions" (Pet. Br., pp. 8-9, 11-15) to the benefits program, arguing that the costs paid by all employees are the same, without regard to gender. Whether or not contributions to support the disability benefits program are equal is irrelevant in considering whether the coverage of the program has been structured so as to exclude a significant group—all necessarily women—from its benefits.[19]

As distinguished from *Aiello*, the disability benefits plan herein arises directly out of the relationship between an employer and its employees where the critical concern is what happens to an employee—loss of his or her income, ability to obtain hospitalization and medical coverage and protection of job rights such as seniority—when he or she is unable to work. Given this purpose, acknowledged

[19] The "equal contributions" argument, in fact, demonstrates the discriminatory nature of the program. If men and women contribute equally for protection against the risks of disability, then women are *not* receiving equal protection. Men are covered for 100% of their risks of disability and women for less than 100%, since pregnancy is such a risk. Eliminating from coverage, for both men and women, such risks as attempted suicide which are neither statistically significant nor predictable, but suffered by both men and women, does not diminish the fact that Petitioner has failed to provide to women alone protection for a sex-unique disability, but has not made a similar exclusion for male employees.

by the Court below, 511 F. 2d at 206, excluding a substantial group of employees—all women—does not serve the needs or objectives of the program. Because of their inferior economic status, women are more likely to need the protection of a disability income protection program than men. In this context of an employer's decision to protect its disabled employees from the risks attendant to their inability to work, Liberty Mutual does not provide aggregate risk protection. Such a program similarly does not serve the needs or objectives of Title VII which is aimed at insuring that women are not disfavored in benefits or other terms and conditions of employment.

II.

The Mere Invocation of Costs Cannot Be a Defense To Failure To Affording Equal Benefits To Women Disabled By Pregnancy.

A. The Title VII Defense of Business Necessity Does Not Include the Defense that an Increase in Costs Will Justify a Policy Which Discriminates Against a Protected Group.

The courts below found that costs of providing equal benefits to women disabled by pregnancy were not a defense under Title VII.[20] Indeed, although this court in *Aiello* found that the State's concern for the fiscal integrity of its insurance program provided a sufficiently reason-

[20] The Court gave deference to EEOC Cost Guidelines, 29 C.F.R. 1604.9(e), 511 F.2d at 206. Other Courts holding disparate treatment of women disabled by pregnancy to be violative of the Act have also relied upon these Guidelines. See, e.g., Gilbert, *supra*, 375 F. Supp. at 382; *Zichy* v. *City of Philadelphia*, 392 F. Supp. 338, 345 (E.D.Pa. 1975); *Dessenberg* v. *American Metal Forming Co.*, 8 FEP Cases 290, 292-293 (N.D. Ohio 1973).

able[21] justification for its decision to exclude pregnancy coverage, the fact is that Title VII's direct and positive focus on problems of employment discrimination does not permit fiscal concerns to carry such justification weight.

As this court noted in *Griggs*, Title VII's "touchstone" in determining whether to sustain discriminatory practices is "business necessity," 401 U.S. at 431. This defense was described by the Second Circuit in *U.S.* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2nd Cir. 1971), as meaning more than simply serving "legitimate management functions." In *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 796-800 (4th Cir. 1971), *cert. dism.* 404 U.S. 1006 (1971), the test was framed as requiring a three-step analysis: (a) the business purpose must be "sufficiently compelling" to override the impact on a protected group; (b) the present policy must, in fact, carry out the purpose it is claimed to foster; (c) there must be *no* acceptable alternative policy which would better accomplish the purpose, or accomplish it equally well with a lesser disparate impact.[22] See also *Gilbert, supra,* 10 FEP Cases at 1205-1206 and n.21.

As the court below noted, the business purpose of Liberty Mutual's income protection plan was to "help employees through the financially difficult times caused by illness," 511 F. 2d at 206. Since this purpose is not served by excluding a definable group of women from such help, and

[21] The presumptions of validity and deference to police power decisions which attach to legislative judgments under Fourteenth Amendment jurisprudence [e.g., *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)] do not exist under Title VII which imposes far more stringent burdens on employers and pays little thought to motives. The court below recognized this critical distinction, 511 F. 2d at 203.

[22] See also, *Local 189, United Papermakers & Paperworkers* v. *United States, supra,* 416 F. 2d at 989; *Sprogis* v. *United Air Lines, supra,* 444 F. 2d at 1201.

Liberty Mutual having failed to show either that an alternative policy could not accomplish this purpose in a non-discriminatory fashion, or that the increased costs are "sufficiently compelling" to excuse them from doing so, costs should not be accepted as a defense to these policies.[23]

The EEOC, along with various state fair employment practices agencies, has thus declared that mere finances will not excuse discrimination. 29 C.F.R. §1604.9(e) provides that an employer may not seek to justify discrimination between men and women with regard to fringe benefits on the basis that "the cost of such benefits is greater with respect to one sex than the other." This guideline, relied upon by the courts below, clearly furthers Congressional intent in ordering the elimination of stereotyped generalizations about protected groups which operate as a barrier to full employment. Identical guidelines govern comparable state legislation. See, e.g., New York Division of Human Rights Rulings on Inquiries § 16.G, p. 29; Maryland Sex Discrimination Guidelines, 820.08(e).

If the mere assertion of expensiveness could be used to avoid compliance with the Act, few discriminatory practices would ever be struck down.[24] Unless Liberty Mutual can sustain the full burden of proof imposed in establishing

[23] The same analysis applies to Liberty Mutual's attempt to justify its maternity leave policies on the basis of a claim that most women do not return to work following childbirth. As this is based upon "stereotyped characterizations" of women which makes "no provision for considering individual capabilities," the court below correctly rejected it, 511 F. 2d at 208. *Cf. Cleveland Board of Education* v. *La Fleur, supra; Gilbert, supra,* 10 FEP Cases at 1205-1206, n.21.

[24] Courts have held that the costs of equal treatment of pregnancy disability, whatever they may be, are insufficient to save discriminatory policies, particularly where the employer has not even considered alternative methods of coverage. See *Gilbert,* 375 F. Supp. at 367.

the business necessity defense, costs alone are insufficient to uphold these challenged practices.[25] Failing to do so, the courts below correctly rejected Petitioner's claimed defense.

B. The Public Policy of Non-Discrimination Precludes Justifying Discriminatory Practices in Terms of Costs.

As the court below noted, Title VII was specifically directed at assuring equality of employment opportunities, 511 F. 2d at 204. The policy of this nation has thus been set by Congress, acting through its Commerce Clause power. That policy makes it unlawful to do business in a manner which discriminates against women, as surely as against minorities. As in many other areas of the law, the financial burdens of doing business in a legal manner are often far greater than those involved in shading or avoiding legal obligations, but public policy precludes that excuse.[26] This is particularly true where the policy furthered is one of eliminating discrimination.

1. *Discrimination*

Courts have firmly rejected arguments of costs in defense of racially discriminatory practices of all kinds. In the area of public accommodations, it is clearly established that the cost of conforming to law cannot be a defense to racial discrimination. In *U.S. by Katzenbach* v. *Gulf State Theatres, Inc.* 256 F. Supp. 549, 552 (D.C. Miss., 1966) a

[25] It obviously increases employer expenses to outfit women with police uniforms and equipment, but no court would uphold exclusion of women from law enforcement agencies on such grounds. Similarly, testing validation, restroom facilities and training programs may cost more, but refusals to provide these items for women would violate the Act, notwithstanding.

[26] *Cf. Potlatch Forests, Inc.* v. *Hays,* 318 F. Supp. 1368, 1375 (E.D. Ark. 1970), *aff'd.* 465 F. 2d 1081 (8th Cir. 1972): "federal labor legislation enacted over the last thirty odd years has placed many onerous burdens on employers."

theatre owner argued that excluding Negroes was "purely economic, i.e. Negroes are unacceptable to the non-Negro patrons upon whose continued support the business depend[ed]." However, the court found the only pertinent issue to be the fact that "Negroes are admittedly excluded" and since this "the law forbids", the discriminatory practices were enjoined. This Court reached the same conclusion in *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 260, (1964), interpreting 42 U.S.C. 2000a, holding that a claim that economic loss would occur if blacks were allowed to rent rooms in the motel, was "of no consequence since this Court has specifically held that the fact that a 'member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier' to such legislation." The defense of increased costs as a rationalization for practices which perpetuate racial inequality has also been properly rejected in the area of public education. See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education,* 306 F.Supp. 1299, 1312 (W.D. N.C. 1969); *Goss* v. *Board of Education, City of Knoxville, Tenn.,* 482 F.2d 1044, 1046 (6th Cir. 1973), *cert. den.* 414 U.S. 1171 (1974); *Cato* v. *Parham,* 297 F. Supp. 403, 411 (E.D. Ark. 1969).

This court, construing the Equal Pay Act, 29 U.S.C. §206(d) in *Corning Glass Works* v. *Brennan,* 417 U.S. 188 (1974), found no justification for base pay differentials between women on a day shift and men on a night shift, despite the fact that the employer saved money:

> [t]he differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which *Corning* could pay women less than men for the same work. *That the company took advantage of such a situation may be understandable as a matter of economics, but its*

> *differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.*[27] (Emphasis added.)

If it costs more to provide fringe benefits to employees without regard to their sex,[28] then that is simply the price which the law exacts to eradicate discrimination from the marketplace.

2. *Other Areas of Law*

Just as our commitment to equal rights precludes justifying discriminatory practices on the basis of the financial convenience of those who discriminate, our policies in other areas have rejected fiscal defenses, or ordered com-

[27] Although in the context of damages, courts awarding back pay for discrimination under Title VII do so without regard to an employer's good faith or economic situation. See, e.g., *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F. 2d 1364, 1377, n.37, 1380 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F. 2d 211 (5th Cir. 1974); *Albemarle Paper Co.* v. *Moody,* —— U.S. ——, 45 L.Ed 2d 280, 296-297 (1975). "Parties who operate an unlawful hiring arrangement or practice do so at their peril," *Yuba v. Consolidated Industries, Inc.,* 136 N.L.R.B. 683, 688 (1962). This concept includes claims of fiscal considerations. Petitioner has engaged in massive sex discrimination over the years. See 372 F. Supp. at 1149-1155; 508 F. 2d 239. The money it has saved through such practices must be balanced against any costs arguments it now raises. The Bell System, for example, was estimated to have saved over $500 million dollars each year due to its sexually discriminatory employment practices. Copus Report, pp. 175-176. All such employer claims of fiscal inconvenience must be viewed in the light of the monies they have saved in the past by violating the Act.

[28] The *Gilbert* court recognized that "at the core of any suit alleging discriminatory 'compensation, terms, conditions or privileges of employment' are dollars and cents," 375 F. Supp. at 382, but declined, as did the courts below, to find this a viable defense. This result has been reached in other cases involving fringe benefits unrelated to pregnancy disability. See, e.g., *Rosen* v. *Public Service Elec. & Gas Co.,* 477 F.2d 90 (3d Cir. 1973) (pension benefits); *cf. Bowe* v. *Colgate-Palmolive* (Christmas bonuses and vacation pay), 489 F.2d 896 (7th Cir. 1969).

pliance with the law despite economic hardships. For example, in the area of antitrust, courts have put the Congressional goal of protecting free business competition from the unlawful restraints of trade above arguments that the specifics of such enforcement will be too costly. This Court has affirmed this basic principle many times. See, e.g., *United States* v. *Crescent Amusement Co.*, 373 U.S. 173, 189 (1944): "[D]issolution of the combination will be ordered. . . . Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." See also *International Boxing Club* v. *United States,* 358 U.S. 242, pp. 256-260 (1959). In *U.S.* v. *E.I. DuPont & Co.*, 366 U.S. 316 (1961), a partial divestiture order of the district court was reversed, which had focused on "economically oppressive", harsh income tax consequences to shareholders of DuPont and General Motors, and possible capital financing problems, *U.S.* v. *E.I. DuPont de Nemours,* 177 F. Supp. 1, 17-18, 35 (D.Ill. 1959). This court found that "[T]he key to the whole question of an antitrust remedy is . . . the discovery of measures effective to restore competition" and that "courts . . . are required to decree relief effective to redress the violations whatever the adverse effect of such a decree on private interests." 366 U.S. 316, *supra,* at 326. Thus, where drastic remedies, including that of divestiture, are needed to effectuate antitrust policies, such relief will not be denied because economic hardship, no matter how severe, will result. See also, *United States* v. *Corn Products Ref. Co.*, 234 F. 964 (S.D. N.Y. 1916) *app. dism.* 249 US 261 (1919); *United States* v. *E.I. DuPont de Nemours & Co.*, 188 F. 127 (D.Del. 1911); *In re Crown Zellerbach Corp.*, CCH Trade Reg. Rep. 1957-1958 Paragraph 26, 923, at p. 36, 462 (FTC 1958). *Cf. Commonwealth Edison Co.* v. *Allis-Chalmers Manufacturing Co.*, 245 F. Supp. 889, 943. (N.D. Ill. 1965), rejecting as immaterial the defense of "economic coercion", noting that such a defense "reduced to its essentials, is a contention that if a [a business] can grow by violating the antitrust laws, then it has the right to violate those laws and injured customers be damned."

C. The Cost Defense Is Irrelevant In Light of Employer Motives For Affording Disability or Other Fringe Benefits.

This Court in *Aiello* found that California's objective in establishing the contributory insurance program was to insure most risks by distributing available resources in a way which assured solvency and "permitted low income employees to participate with minimum personal sacrifice." 417 U.S. at 494. In short, fiscal needs were at the heart of the legislative judgment involved. In the employment context, employer motives are very different. Cost claims are merely excuses for differential treatment, not the rationale of fringe benefit availability, nor a limiting aspect of altruistic intentions.

Liberty Mutual has completely failed to produce any explanation for its policies except to claim that its expenses of doing business will increase. This Court should apply the same salutory rules to such a claim as it has to similar claims in other areas of the law.[29]

The claim that *Aiello* holds that increased costs of providing such benefits are a sufficient reason to justify re-

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[29] See, e.g., *Goldberg* v. *Kelly*, 397 U.S. 254, 266 (1970); *Bowles* v. *Willingham*, 321 U.S. 503, 518 (1944); *cf. Weinberger* v. *Weisenfeld*, —— U.S. ——, 43 L. Ed.2d 514 (1975), holding that 42 U.S.C. 402(g) unlawfully deprived female wage earners of equal Social Security Act death benefit protection for their families. The added costs to the Government in equalizing such protection are clear. See also *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969); *cf. James* v. *Strange*, 407 U.S. 128 (1972).

moving one group of employees[30] from coverage is thus misplaced. The court below, like others which have rejected the employers' cost claims, found that "employers offer disability insurance plans to their employees to alleviate the economic burdens caused by the loss of income and the incurrence of medical expenses that arise from inability to work," 511 F.2d at 207. However, as noted at pp. 12-13, *supra,* employers gain substantial advantages from affording this protection, by attracting competent employees, instilling loyalty and building morale, thereby increasing productivity, and, hence, profits. These selfish interests expose the real flaw in all employer cost defenses.

A state's decision to protect disabled workers by administering a contributory insurance plan (or providing welfare aid to poverty-line families) has no selfish motives of this type. Thus, the *Aiello* decision's concern with State fiscal objectives cannot be compared to the decisions below. States do not establish social welfare programs in a competitive setting with other states to attract recipients. The origin and purpose of employer fringe benefits programs, however, is a direct function of economic competition with other employers for the labors of qualified and loyal employees. See Allen, *Fringe Benefits, supra.* Thus, it may have been appropriate under Fourteenth Amendment standards of review, for the *Aiello* decision to focus on California's possible costs, because the costs of the insurance program were central to its objectives of keeping contributions at a minimum to aid those workers at the low end of the income scale, 417 U.S. 496. However, employer objec-

[30] *Aiello's* Footnote 20, 417 U.S. at 496-497, notwithstanding, Liberty Mutual has not set up a program which distinguishes non-pregnant and pregnant persons. It has excluded from benefits a sub-class of women who are similarly situated, i.e., *disabled,* to those receiving benefits. *Cf. Phillips* v. *Martin-Marietta Corp., supra.* The court below so found, 511 F.2d at 206.

tives in providing fringe benefit coverage are unrelated to costs and the assertion of costs as a defense must be rejected.

III.

Objective Statistics Demonstrate That Probable Costs of Providing Equal Benefits To Women Disabled By Pregnancy Are Not As Great As Claimed and Would Not Be Sufficient To Satisfy Title VII Business Necessity Standards.

Liberty Mutual's failure to provide equal employment benefits to women disabled by pregnancy is a direct function of the amount of money claimed to be necessary to do so. Insofar as it did not introduce any substantive data on claimed costs below, it relies upon briefs of *amici* and other materials which are alleged to show that costs are prohibitive. However, data regarding probable costs has been prepared by more objective sources which shows that any increase would be a negligible percentage of an employer's total compensation costs and thus inadequate under the business necessity standards discussed in Point II, *supra.* Further, the decision of many private employers to cover women so disabled, underscored by similar decisions by Congress, federal agencies and other nations, demonstrates that costs cannot be as substantial as Petitioner claims.

A. The Bell System Statistics

The Bell System has presented to the Court a study submitted to the Office of Federal Contract Compliance in opposition to its proposed Guidelines on Sex Discrimination, 41 C.F.R. §60-20.3, which include a requirement for equal treatment of women disabled by pregnancy which is identical to the EEOC Guidelines, 29 C.F.R. 1604.10. This study

is alleged to represent the experience of the Bell System under its Plan, suggesting (1) that women already receive a disproportionate percentage of the benefits conferred under the Plan compared to their numerical representation in the work force; (2) that coverage of pregnancy disability will increase this disparity; and (3) that enormous expenses will result from such coverage.

In reciting the present "disproportionate benefits advantage" received by Bell System women, due to claimed rates of frequency and severity of female disability absences, no mention is ever made of the present costs of such coverage. Such an omission is startling, particularly where the study contains estimates of how much it would cost to cover pregnancy disability.[31] It is apparent that the Bell System is in a position to make such calculations; thus, it may be presumed that it has done so, and that the costs presently paid to men and women disabled under the Plan do not bear out the disproportionate advantage argument. Indeed, some commentators have suggested that if employers were asked to provide definitive data on costs of their expenditures for employee fringe benefits, including disability benefits, these costs would be equal or greater for male employees than for female.[32] Absent any statistics

[31] The estimate of between $15 and $19 million dollars for coverage of pregnancy is based upon an assumed disability period of eight weeks, computed on the basis of the average senority and salary of women taking maternity leave in one company (Br. p. 7, App. 8a-9a). No statistics are present from which it can be inferred that the average seniority of child-bearing age women is two-to-five years system-wide. Further, Xerox Corporation has found that no correlation exists between seniority or age and duration of pregnancy disability. See Hutchinson & Wright, "Pregnancy Disability—Time Duration and Disability Benefit Cost" (Xerox Corp. 1974), pp. 3, 7, 10.

[32] See CACSW, Letter of J. Gutwillig, Chairman to Secretary of Labor, June 27, 1974, p. 2: "There is a strong possibility that if an employer's costs for [fringe benefits] were computed on the basis of actual per capita expenditures in behalf of male and in behalf of female employees that the expenditures for female employees would be less than for male employees."

on Bell System's present costs of providing disability income protection to men and women, this Court should reject the "disproportionate advantage" arguments presented here to support the exclusion of pregnacy disability as a non-discriminatory employer judgment.

In addition, substantial evidence exists to show that frequency and severity of disability is not related to sex, but is related to the nature and type of job one holds. Thus, individuals holding low-paying, less skilled or responsible positions, or "dead-end" jobs are far more likely to be absent from work than other employees. See, e.g., U.S. Department of Health, Education and Welfare, "Time Lost From Work Among the Currently Employed Population, United States—1968", Vital and Health Statistics, Series 10, No. 71, Table B, pp. 5-7. Where employers have traditionally relegated women to such jobs, the rates at which they are absent from work may not be claimed to be due to their sex. This is particularly true of the Bell System's utilization of such an argument, where it has made no showing that these higher frequency and severity rates are not related to the low status and salary received by women in its employ.[33] Xerox Corporation found, for example, that its lower paid female employees tended to have longer disability periods. Hutchinson & Wright, p. 7. A survey of incidence and length of hospitalization for Metropolitan Life Insurance Company employees in 1973 showed that

[33] The Copus Report found, for example, that "the most realistic expectation for women [in the Bell System] is a career that begins and ends in the Operator job. Women with 20, 30 or even 50 years of Bell System service are often still in the entry-level position of Operator." p. 126. See also the findings of the district court below regarding Liberty Mutual's disparity in promotional practices, 372 F.Supp. at 1154-1155, *aff'd.*, 508 F. 2d at 257-259.

men had a greater incidence and length than women. See Gutwillig Letter, *supra,* and annexed Statistical Bulletin Tables. On a nation-wide basis, it has been concluded that days lost by men and women due to disability are roughly equivalent. CACSW, "Women in 1971", *supra,* p. 55. Consequently, the claimed "disproportionate advantage" to women at present is not supported by any competent evidence whatsoever.

The same is true for the argument that a substantial number of women disabled by pregnancy will fail to return to work following the end of the disability period (See Pet. Br., p. 19; Bell System Br., p. 8), thereby making coverage of this disability a form of severance pay. It is questionable that the experience of only one Bell System employer in 1972 possesses any current system-wide accuracy. Even assuming *arguendo* that it does, its report that 48% of the women who took maternity leaves failed to return makes no assessment of the obvious relationship between that fact and the Bell System's policy of denying reinstatement rights to all women returning from such leaves. Clearly such a policy serves to encourage women not to return to work.[34] In fact, employers such as Liberty Mutual, General Electric or the Bell System which perpetuate forced maternity leave policies, unrelated to actual disability, force women to seek employment elsewhere even prior to childbirth since they must

[34] Bell System statistics fail to include any updating following 1972, a time when it is claimed that such policies ceased; again, the absence of more recent statistics may be presumed to be due to the fact that they are not supportive of this argument. Further, the System offers no indication of the number of quits annually by all employees, or the number of women generally who quit due to the absence of any incentive to remain in low-paying dead-end jobs. See, e.g., Copus Report, *supra,* pp. 126-127, which found that 69% of all terminating service representatives in 1970 were dissatisfied with their chances for promotion.

support themselves and their families by some means. Nation-wide, statistics have shown that women are less likely than men to quit their jobs. Armknect & Early, "Manufacturing Quit Rates Revisited: Secular Changes and Women's Quits," *Monthly Labor Review,* December, 1973, p. 56.

It is clear that an employer's benefit policies and reinstatement guarantees will have a substantial impact upon an employee's decision to return following disability absence. Studies of employer treatment of women disabled by pregnancy conducted by Prentice-Hall, for example, demonstrated that rates of return for women disabled by pregnancy increased dramatically when employers began treating that disability equally with others.[35] Prentice-Hall Report Bulletin No. 25, June 6, 1972, p. 463.

An employee who knows that her employment rights (such as seniority, accrual of wage progression credit, pension credit) are being denied or limited during disability, while routinely granted to all other disabled employees, is hardly encouraged to make a special effort to return to her previous employer, especially where her hopes of promotion and advancement are already minimal. As noted in "Pregnancy Classification", *supra,* 75 *Col. L. Rev.* at 476:

> One way to keep mothers at home is to treat them like temporary or less important labor. This can be accomplished in part by excluding them from sick pay, disability benefits for childbirth or both, and then by complicating their reentry into the job market

[35] A woman's link to her job often results in a decrease in the length of her disability claim. Thus, in New Jersey, working women were found to claim less benefits than non-working women insured under the statute. See Gutwillig, Address to American Hospital Assn. Inst., Key Biscayne, Florida (July 27, 1972).

through reductions in their seniority or the provision of unacceptable substitutes for the positions they were forced to leave. Furthermore, women who are 'expected' to leave their jobs when they become pregnant can be encouraged to do so by paying them lower salaries and giving them dead-end jobs.

The statistics introduced by the Bell System, and relied upon by Liberty Mutual in justification of its refusal to cover women disabled by pregnancy, must therefore be discounted as an accurate or reasonable forecast of fiscal problems claimed to accompany this aspect of equal employment rights for women.

B. Insurance Company Statistics

Petitioner, along with two of the *amici* representing its position herein,[36] argues that insurance company statistics should be utilized in assessing the allegedly prohibitive costs of equal treatment of pregnancy disability. In reviewing this data, however, it is critical to keep in mind the fact that these companies, like Liberty Mutual itself, are *employers* covered by Title VII. Thus, their claims of costs cannot be considered objective or neutral. Their interest in convincing this Court that Title VII should not mandate equal treatment of women disabled by pregnancy is no different from that of the Bell System or any other employer.

In addition, the statistics discussed by these insurance companies are not an objective measure of the actual costs such equal benefits coverage would entail. The insurance industry has warned that data on benefit claims and duration of disability which uses sex as the classification factor

[36] American Life Insurance Association and Health Insurance Association of America ("ALIA" and "HIAA") and American Mutual Insurance Alliance.

does not accurately measure disability cause or occurrence. The industry has relied so heavily upon sex-stereotyping in formulating its actuarial data and rate structures that its own representatives have urged complete revision of industry practices.

1. *Insurance Industry Statistics Do Not Present An Accurate Picture of Present Disability Patterns*

In arguing that it costs one and one-half times as much to cover disabled women than disabled men (ALIA Br., p. 26) great reliance is placed upon reports issued by the Society of Actuaries in 1962, 1971 and 1973.[37] All of these Reports rely upon indemnity tabulars prepared for the years *1947-1949*. This fact alone justifies dismissal of these statistics. It is hardly necessary to point out that nearly 30 years ago, the entire economic picture of this country was vastly different from today. Few women worked out of need or otherwise; those who had held jobs during World War II were eliminated from the job market as men returned from the war and reclaimed their positions. The post-war baby boom, the post-war economic boom, and the very different social mores and values which dominated that era in our history form no basis whatsoever for reliable statistics regarding costs, birth rates, claim patterns or employment needs of today's working women.

Further, use of these 30-year old tables as an indicator of present claim patterns is misplaced insofar as factors other than gender are not included within them. Thus, in *Transactions* 1962, p.79, the Society of Actuaries' Reporting Committee cautioned that its tabular ratio charts should be evaluated with "caution" because

[37] These "Reports of Mortality and Morbidity Experience", will be referred to as "*Transactions*" for each respective year. Many *amici* base their cost estimates almost exclusively upon these reports.

> the presentation of Group Accident and Health experience in the form of ratios of actual to tabular claims *is still in the experimental state, with many factors affecting experience not reflected by the tabulars.* For example, the tabulars do not contemplate a variation caused by the age distribution or the geographic location of the employees. (emphasis added)

Actual to tabular ratios (the amount of "standard" [neither high or low risk] indemnity insurance coverage for total covered weekly payroll compared to amount of disability claims actually paid) contained in the 1947-1949 tables are further restricted by reference to employers of an "exposure size group" of $40,000 weekly payrolls.[38] It is clear that employers of the size of Liberty Mutual, the Bell System, or General Electric would have substantially different and lower costs of disability insurance coverage. The 1962 Report notes that the small exposure size group was used "to minimize the effect that jumbo groups might have upon the ratio of actual to tabular claims." *Transactions* 1962, p. 78.

Change in the nature of the working population and the quality of working conditions over the past thirty years has obviously affected frequency and severity of claims in a major way. The Reports take note of nationwide disability statistics which show a negligible difference between men and women in days of disability per thousand,[39] and concede flatly that the tabular ratios "may not reflect current claim patterns." *Transactions* 1971, p.

[38] It is difficult to assess the impact of such a $40,000 weekly payroll limitation upon today's economy and money market figures.

[39] See, generally, "Report of Proceedings of Hearings on Economic Problems of Women," "*Joint Economic Committee of Congress*, Vol. 3 (July 12, 1973), (herein "Report—Economic Problems"), Statement of Barbara Schack, p. 178.

190. Additionally, they note that "maternity tabulars *do not reflect the substantial decline in birth rates in recent years.*" (*Id.*, emphasis added.)

In 1973 the Society reported that age distribution, industry classification and size of particular cases, admittedly relevant factors in determining actual disability experience, were all excluded from these ratios. *Transactions* 1973, p. 271; see also *Transactions* 1971, p. 190.

The statistics relied upon by the insurance companies show merely that when disability costs are analyzed solely in terms of gender, which is concededly not the relevant or proper analytical measure of actual experience, they will show a higher percentage of claims by women for a period thirty years behind us in history. This Court should take into account the significant time differential, as well as the industry's own cautionary remarks, when assessing Petitioner's reliance upon such statistics.

2. *Sex-Based Insurance Classifications Are Actuarially Suspect*

Experts within the insurance industry have repeatedly warned against reliance upon sex-based classifications in determining valid costs of insurance coverage. The "Opinion and Report" of the New York State Superintendent of Insurance (January 28, 1975) (herein "New York Report") found that "insurance companies have engaged in underwriting practices that make numerous distinctions based on the sex of the applicant or policyholder," and that "*such underwriting distinctions emanate from unjustified subjective views of the role of women in our society*" which "are *not derived from objective data.*" New York Report, pp. 2-3, 4 (emphasis added). Pennsylvania's Commissioner of Insurance, testifying before Congress regarding the economic problems faced by women, noted that sex-based classifications were made by the insurance industry as a

matter of "convenience", a "homogenous classification of women" which he found to be lacking in meaning in the face of women's present economic position. He urged the "re-evaluat[ion] of all sex-classifications in the insurance business." [40]

Despite evidence which indicates that age, income level and type of job are far more significant actuarial factors than sex in predicting the amount of benefits employees will claim,[41] Reports of the Society of Actuaries fail to note that their statistics are based upon inaccurate, albeit "convenient", misconceptions about the role of women in the marketplace. The 1962 Report does not, for example, take into account the lower wages paid in largely female industries, nor the relationship of salary and job classification to claims made. Absence of such data is a direct result of industry stereotypes. Pennsylvania's Commissioner testified that most insurance companies "seem to assume that women don't need or want to work, so that disability pay would just be extra income for some women who would really prefer to stay home with the house and children." [42] Their rate differentials are structured accordingly.[43] Despite the negligible difference between men and women in disability days per thousand, for example, the Guardian Life Insurance Company charges women almost three times

[40] "Report—Economic Problems", p. 159. The Commissioner also stated that "[N]onetheless, there are some convenient bases for classification which the insurance industry does not now use. One is color. Although blacks have a shorter life expectancy than whites, no classification based on color is used. Such a classification is considered to be unacceptable from a public policy standpoint."

[41] See California Assembly, Joint Committee on Unemployment Compensation Disability Insurance, Final Report 43 (1966).

[42] "Report—Economic Problems", *supra*, p. 178.

[43] See, e.g., Manual of North American Reassurance Company, stating that "women's role in the commercial world [is] a provisional one." *Id.*, p. 174.

the premium rate charged men for identical disability insurance. "Report—Economic Problems", *supra*, p. 178. Available coverage is also dispensed to women on a differential basis. See *Stern* v. *Massachusetts Indemnity and Life Insurance Co.*, 365 F.Supp. 433 (1973). Many companies restrict women to a two-to-five year benefit period, while offering coverage to men in identical occupational classifications through age 65, or for life. "Report-Economic Problems," *supra*, p. 160. Many companies charge increased premiums to employers with higher percentages of women in the work force regardless of actual disability experience, or age, job classification or salary factors. *Id.*, p. 174.

Sex-stereotyping for the convenience of the insurance industry's rate structures must not be permitted to stand as the basis for assessing real costs of disability coverage for women whether for pregnancy disability or otherwise. As noted by Thomas J. Gilhooly, General Counsel of HIAA:

> Any studies which can lead to a more sophisticated classifications of risks which would at least minimize the sex factor should be encouraged. Certainly, in disability coverage the trend should be toward underwriting the job and not the sex. *The old stereotyped distinctions whether in benefits, underwriting or rating are no longer valid.*
>
> ("Equal Rights and Insurance", *Chartered Life Insurance Underwriters*, Vol. 29, 1975, p. 41; emphasis added.)

In view of the self-serving and generalized nature of their data, to excuse disparate treatment of women in an area as critical as equal employment opportunity because the insurance industry says it will cost more

to comply with the law, without evaluating the basis upon which that claim is made, does incalculable harm to millions of working women who need and want the rights and privileges of employment on the same terms as men. Until the insurance industry can provide cost statistics which accurately measure disability experience of working men and women, and reflect the true picture of women in the job market, their present statistics point out only one thing —it costs more because they say so.[44] This is no basis for restricting the mandate of Title VII.

C. Objective Statistics and Actual Private Employer Experience Show That Anticipated Costs Will Not Be As Great as Petitioner Claims

Whatever the costs of equal treatment of pregnancy disability, the fact is that a substantial number of private employers are able to cover it on the same terms as other disabilities without jeopardizing their business.

In 1972, a detailed study of the practical cost impact of implementing the 1972 EEOC Guidelines was undertaken, using the Federal Reserve Bank of Boston, Massachusetts as the subject employer.[45] This study concludes that alleged cost claims such as those made by Petitioner and its *amici* do not stand up under realistic analyses of relevant employer wage costs.

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[44] Much of the allegedly supportive statistical-cost data relied upon by the *amici* insurance associations is not even available to the public for analysis. Counsel for CWA requested material cited in these briefs from *amici*, but was told that it was "confidential" and could not be released. This Court should reject data shrouded in claims of secrecy as unsupportive, just as surely as that available for scrutiny which reveals inaccurate and anachronistic methodology.

[45] Greenwald, "Maternity Leave Policy," *New England Economic Review*, January, 1973, p. 13 (herein "Greenwald").

The Bank was selected because it contained a number of factors considered significant in determining probable costs to the average employer of liberalized benefits: it had a large, fairly young female staff, and extremely generous sick leave policies. Greenwald, *supra*, p. 15. The study found that the labor costs of covering women disabled by pregnancy would have risen only by approximately ½ cent per hour in 1971, and ¼ cent per hour in 1972. Greenwald, *supra*, p. 17. Payroll costs were estimated, for ten weeks of pregnancy disability protection, to add $16,945 to disability costs if all the Bank's women disabled by pregnancy in 1971 had been covered.[46] The study concluded that its "examination of the costs of implementing the new EEOC guidelines clearly indicates that the costs would have a negligible impact on overall labor costs." *Id.*, p. 18.

The Greenwald study supports statistics gathered by the United States Department of Labor which indicate that, at the end of 1971, total costs of *all* health insurance and disability compensation for employee disability absence was only 5.5% of total employer wage and salary costs, and show that the costs of covering pregnancy disability are a "fraction of a percent of total wage and salary costs."[47] Statistics introduced in the Gilbert trial, showed that overall employee fringe benefits amounted to 34% of base pay, while disability benefits were 1.8% of base pay. Based upon the number of disabled female employees in 1971-1972, and

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[46] The study also showed the impact of the declining birth rate. For eight months in 1972, costs of such coverage dropped to $6,907. Similarly, pregnancy accounted for only 4.5% of the Bank's turnover among its female staff in 1972, compared to 12% in 1971.

[47] CACSW, Remarks of J. Gutwillig, Chairman, before American Hospital Association Institute, July 27, 1972, pp. 9-10. Chairman Gutwillig also noted that estimated premiums for a typical hospital employer show that cost of pregnancy disability coverage (prior to deductions for large employers) would be less than $1.50 per month per employee.

a projected six week disability period, it was estimated that covering women so disabled would have amounted to 7% of 1.8% of base pay in 1970 and 4% of 1.8% of base pay in 1971. Even using the Bell System estimate of $19 million dollars to cover women disabled by pregnancy, CWA has found that such a sum in fact amounts to slightly more than one cent per hour and less than one fifth of one percent of the total compensation (wages and fringe benefits) presently paid to all its employees.[48]

[48] These figures are obtained as follows: At the end of 1973, the Bell System employed 818,000 persons. As of June, 1975, the average number of hours worked per week was 38.7. In the 1974 collective bargaining negotiations between the Bell System and CWA, 52.2 weeks per year was agreed to constitute the number of paid weeks of compensation per year (including vacation, holidays and disability). Multiplying the number of paid weeks by the number of hours worked (52.2 x 38.7) equals 2009.7 (2010) as the total annual paid hours per employee. CWA estimates that hourly estimated compensation (salary and fringe benefits) for each employee in the 1975 contract year is $7.50. Multiplying paid hours per year by $7.50 (2010 x $7.50) yields $15,075 as total annual compensation paid by the Bell System per employee. Multiplying the annual paid employee compensation by number of employees ($15,075 x 818,000) amounts to total annual compensation paid by the Bell System (including fringe benefits) to all its employees of $12,331,350,000. The total compensated hours of all employees (number of employees x total paid hours paid per employee per year) equals 1,664,180,000 hours. By dividing the Bell System's claimed $19,000,000 figure for costs of pregnancy disability coverage by total number of compensated hours per employee per year, extension of disability coverage to women disabled by pregnancy amounts to an increase of slightly more than one cent ($.01^{16}/_{100}$) per hour in hourly compensation paid to Bell System employees. Dividing the alleged cost of maternity benefits by the total compensation presently paid by the System to all employees ($12,331,350,000) demonstrates that provision of pregnancy disability benefits amounts to .15 percent, less than one-fifth of one percent, of the total amount of yearly compensation paid by the Bell System to all its employees. Statistics on contract negotiations are obtained from an internal CWA *Report on Major Improvements and Changes Agreed Upon By CWA and A.T.&T. and its Subsidiaries* (August 5, 1974). Statistics on hours worked are reported in U. S. Department of Labor, Bureau of Labor Statistics, "Employment and Earnings," Vol. 22, No. 2, p. 91, August 1975.

These percentages are *not* significant in terms of total employer expenses, and thus fail to qualify as a proper business necessity defense. See Point II, *supra.*

Further, the fact that a significant number of private employers do provide disability coverage to women disabled by pregnancy demonstrates that an employer's fiscal soundness is not jeopardized by doing so. Surveys conducted by the Department of Labor show that nearly half of the employer disability plans analyzed provided some form of disability coverage for pregnancy, most of which are totally employer-funded. Other sources have reached the same conclusion.[49] There is simply no private employer data which supports Petitioner's contention that it cannot protect the statistically predictable number of women in the labor force who become disabled by pregnancy.

D. Congress, Federal Agencies, States and Other Countries Have Determined to Provide Disability Protection to Women Disabled by Pregnancy

The decision of the Court below that unsupported claims of costs could not be a defense to Petitioner's policies, 511 F. 2d at 206, is consistent with the intention of Congress which has rejected such defenses, both directly and indirectly. By requiring specific protection for pregnancy disability in the only temporary legislation it has enacted, 45 U.S.C. 351 (k) (2) of the Railroad Unemployment Insurance Act, and by acquiescence in recent Guidelines issued by the Department of Health, Education & Welfare, which are virtually identical to the EEOC Guidelines, mandating equal treatment of women disabled by preg-

[49] U.S. Department of Labor, *Digest of Health Insurance Plans*, Vol. II (1974 ed.; 1975 supplement). See also, Hutchison and Wright, *supra;* Prentice-Hall Report Bulletin No. 24 (March 26, 1974), p. 459; Society of Actuaries, *Transactions* 1972, No. 2, June, 1972 (190-202); CACSW, Item 20-N (July 2, 1971).

nancy by employer disability plans,[50] Congress has expressed its intention that working women receive equal employment disability benefits. The Civil Service Commission does not provide disability benefits to disabled employees but does mandate that pregnancy disability be treated the same as other disabilities for purposes of sick leave, 5 C.F.R. § 630.401(b). See, generally, Federal Personnel Manual, Supplement 990-2, Sub-chapter S 13 (1974). *Cf. Satty* v. *Nashville Gas Co., supra.*

Similarly, a substantial number of states either have disability coverage for pregnancy under disability insurance or unemployment benefits programs, or require its coverage under state fair employment statutes. In New York, the Human Rights Law, Executive Law, § 297 *et seq.*, was recently construed by a unanimous Court of Appeals as requiring equal treatment of pregnancy disability.[51] See, *Union Free School District No. 6* v. *New York Human Rights Appeal Board*, 35 N.Y. 2d 371 (1974), *rearg. den.* 36 N.Y. 2d 807 (1975). See, generally, "Pregnancy Classifications", *supra*, 75 Col. L. Rev. at 470 n. 155 and 471; Hickey, "Changes in State Unemployment Insurance Legislation," *Monthly Labor Review*, January, 1974, pp. 39, 43-44.

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[50] Vol. 40 *Fed. Register* No. 108, § 86.57 (June 4, 1975). Congress was empowered to reject these proposed guidelines under the General Education Provisions Act, 20 U.S.C. § 1232, but did not do so. The proposed Office of Federal Contract Compliance Guidelines, *supra*, are identical to HEW Guidelines.

[51] That Court specifically stated that neither *Aiello* nor any adverse Title VII decision in a case such as that at bar would affect an interpretation of this State statute, 35 N.Y. 2d at 377, n.1. This position disposes of the Petitioner's argument that it would be "anomalous" to require private employers to meet a standard of equality that states as insurers may not be required to meet under *Aiello* (Pet. Br., pp. 9-10). The real anomaly would occur if this Court were to find Title VII more restricted than state fair employment laws.

The lack of viability of the costs argument is also aptly demonstrated by the fact that disability programs have been established in every industrialized nation except the United States which provide benefits to women disabled by pregnancy.[52] At least 70 countries, with far less resources than the United States, have thus determined that economics do not justify limiting the rights or restricting the employment needs of working women.

CONCLUSION

The decision below is in accord with those of five other Circuits and numerous district courts,[53] finding that Title VII's ban on sex discrimination in employment does not end when working women become pregnant. This Court should affirm the Court below in all respects. By so ruling, the Court has a unique opportunity to end stereotypical judgments about the fundamental role which women play in our society. This Court should firmly reject the

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[52] See, e.g., U.S. Department of Labor: Women's Bureau, Bulletin No. 240, "Maternity Protection of Employed Women"; U.S. Department of Health, Education and Welfare, "Social Security Programs Throughout the World, 1971," Research Report No. 40 (1971); Mead & Kaplan, *American Women* (1965), p. 63.

[53] *Communications Workers of America* v. *A.T.&T., Long Lines Dept., supra* (2d Cir.); *Gilbert* v. *General Electric Co., supra* (4th Cir.); *Satty* v. *Nashville Gas Co., supra* (6th Cir); *Farkas* v. *South Western City School District*, 8 FEP Cases 288 (S.D. Ohio 1974), *aff'd.* 506 F.2d 1400 (8th Cir. 1974); *Holthaus* v. *Compton & Sons, supra* (8th Cir.); *Sale* v. *Waverly-Shell Rock Board of Educ.*, 9 FEP Cases 138 (N.D.Iowa 1975), *leave to app. den.*, —— F.2d —— (8th Cir. Jan. 31, 1975, Misc. No. 75-8088); *Hutchison* v. *Lake Oswego School Dist., supra* (9th Cir.); *cf. Cedar Rapids School Dist.* v. *Parr*, 6 FEP Cases 101 (D.Iowa 1973); *Dessenberg* v. *American Metal Forming Co., supra; cf. Lillo* v. *Plymouth Board of Education*, 8 FEP Cases 21 (N.D. Ohio 1973); *Scott* v. *Opelika City Schools*, 63 F.R.D. 144 (M.D. Ala. 1974); *Vineyard* v. *Hollister Elementary School Dist.*, 64 F.R.D. 580 (N.D. Cal. 1974); *Zichy* v. *City of Philadelphia, supra.*

argument that compliance with our national commitment to equal rights in employment may be excused simply because it *may* cost more to provide men and women with equal terms and conditions of employment. The Court should set aside unfounded or biased claims of employer cost and take note of objective statistics which show that protection of women disabled by pregnancy is a *fraction* of overall employer compensation costs. The Court should examine employer objectives served by the establishment of fringe benefit programs, and review these policies in light of such objectives. Employers should be reminded that the business necessity defense to practices challenged under Title VII requires that such practices be substantially related to these objectives, *not* to mere fiscal or management preferences, and to proof that *no* alternative exists which would serve these objectives without effecting a disparate impact upon groups protected by the Act.

In light of employer fringe benefit objectives, excluding women disabled by pregnancy from the scope of benefits programs designed to protect all disabled employees fails to provide aggregate risk protection to women. The experience of private employers who do protect women so disabled, as well as the policies of numerous states, nations, Congress and federal agencies, demonstrates that we need not deprive working women of an equal share of the rights, benefits and privileges of employment. This Court should firmly hold that it is sex discrimination to exclude women from this equal share, and that Congress has forbidden such exclusion by its enactment of Title VII.

The judgment below should be affirmed.

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